A

TAN KWEE

v.

KERAJAAN MALAYSIA & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
NOR BEE ARIFFIN J
[SUIT NO: 21NCVC-118-05-2012]
18 JANUARY 2013

C ***CIVIL PROCEDURE:*** *Pleadings - Issue not pleaded - Failure to plead res judicata in defence - Whether defendant precluded from relying on res judicata*

CIVIL PROCEDURE: *Res judicata - Issue estoppel - Claim against Senior Assistant Registrar and Judicial Commissioner - Allegations of failure to exercise powers and functions with care and honesty in discharge of judicial functions in* D *earlier suit - Whether issues should have been raised during appeal in earlier suit - Whether action ought to be struck off*

CIVIL PROCEDURE: *Striking out - Judicial immunity - Claim against Senior Assistant Registrar and Judicial Commissioner - Whether there was cause of action*

E

CIVIL PROCEDURE: *Striking out - Res judicata - Claim against Senior Assistant Registrar and Judicial Commissioner - Whether issues should have been raised during appeal in earlier suit - Whether action scandalous, frivolous and vexatious - Whether action intended to abuse and embarrass defendants -* F *Whether abuse of process of court*

CONSTITUTIONAL LAW: *Courts - Judicial immunity - Claim against Senior Assistant Registrar and Judicial Commissioner - Allegations of failure to exercise powers and functions with care and honesty in discharge of judicial functions - Whether action maintainable - Whether action ought to be struck* G *off - Courts of Judicature Act 1964, s. 14*

The plaintiff had legal tussles with Syarikat Total Teamwork Sdn Bhd ('TTSB') in the Kuala Lumpur High Court ('KLHC case'). The plaintiff pleaded that Puan Raja Noor Adilla, a Senior Assistant Registrar ('SAR') H in the KLHC case had struck out the plaintiff's statement of defence and counterclaim. On appeal to the Judge in Chambers, the appeal was dismissed. Subsequently damages were assessed and the fourth defendant ('D4') awarded TTSB damages. The plaintiff appealed against D4's decision. The appeal was heard by the fifth defendant ('D5') and I was dismissed. The present action against the defendants stemmed from the plaintiff's dissatisfaction on the assessment of damages made in the KLHC case by D4 and the dismissal of the appeal against the decision of D4 by D5. The plaintiff had appealed the matter to the Court of

Appeal. The plaintiff alleged that the conduct of the defendants had caused the plaintiff defamation, malicious prosecution and emergence of tort for the benefit of TTSB. The defendants were also alleged to have failed to duly exercise the powers and functions conferred on them with care and honesty. The defendants applied to strike out the writ of summons and the statement of claim under O. 18 r. 19(1)(a) or (b) or (d) of the Rules of the High Court 1980 ('RHC').

Held (allowing defendants' application):

(1) The plaintiff's claim against both D4 and D5 were in their capacities as SAR and Judicial Commissioner of the High Court respectively arising from the decisions they had made in the discharge of their respective judicial functions. This action was clearly wrong and not maintainable in law as it was prohibited by s. 14 of the Courts of Judicature Act 1964 ('CJA'). As s. 14 of the CJA afforded D4 and D5 a complete defence of judicial immunity against any civil suit, the plaintiff's action against them was statute-barred. The application of s. 14 of the CJA therefore rendered the plaintiff's action against the defendants clearly and obviously unsustainable. As there was no cause of action against D4 and D5, there could not likewise be any as against D1, D2 and D3. (paras 10 & 14)

(2) The plaintiff's claim was also scandalous, frivolous and vexatious. Her claim was *res judicata*. The assessment of damages and the decision of D5 has been adjudged and a final decision pronounced by the Court of Appeal. The plaintiff was thus estopped in bringing this action on the basis of both *res judicata* and issue estoppels. The present action was an attempt to re-litigate and re-open her earlier case in KLHC case and the appeals against the decisions of D4 and D5, and she could not be permitted to do so. (para 21)

(3) Matters which could have been raised and should have been raised before the Court of Appeal. To raise again here was clearly a case of an abuse of the process of the court. (para 22)

(4) Although the defendants had not pleaded *res judicata* in their defence, this did not preclude the defendant from raising or relying on the doctrine of *res judicata*; *Superintendent of Pudu Prison v. Sim Kie Chong* (refd). (para 23)

(5) The filing of this action demonstrated the plaintiff's intention to abuse and embarrass D4 and D5 and the other defendants. The plaintiff in her pleadings had made numerous allegations and incredulous imputations against both D4 and D5 with blatant and complete disregard to the absolute privilege of judicial immunity conferred by the law on them. The plaintiff had abused the process of the court. (para 28)

Case(s) referred to:

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Berjaya Development Sdn Bhd v. Keretapi Tanah Melayu Bhd & Anor [2007] 6 CLJ 687 CA ***(refd)***

Boey Oi Leng v. Trans Resources Corporation Sdn Bhd [2002] 1 CLJ 405 HC ***(refd)***

Chong Kew v. Leow Lay & Ors [2009] 1 CLJ 756 CA ***(refd)***

Everise Hectares Sdn Bhd v. Citibank Bhd [2011] 2 CLJ 25 CA ***(refd)***

Gabriel Peter & Partners (suing as a firm) v. Wee Chong Jin [1998] 1 SLR 374 ***(refd)***

Hamzah Mat Sah & Anor v. Bank Pembangunan Malaysia Berhad [2012] 1 LNS 384 CA ***(refd)***

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***

Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors & Other Cases [1983] 2 CLJ 68; [1983] CLJ (Rep) 165 FC ***(refd)***

Honan Plantations Sdn Bhd v. Kerajaan Negeri Johor & Ors [1996] 4 CLJ 373 HC ***(refd)***

Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor [2008] 1 CLJ 651 CA ***(refd)***

Law Hock Hua & Anor v. Timbalan Pendaftar Mahkamah Tinggi Kuala Lumpur & Anor [2006] 4 CLJ 300 HC ***(refd)***

Malayan United Finance Bhd lwn. Cheung Kong Plantation Sdn Bhd & Yang Lain [2000] 2 CLJ 601 HC ***(refd)***

New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 LNS 1 FC ***(refd)***

Oversea-Chinese Banking Corpn Ltd v. Sindoma Realty Sdn Bhd and Other Applications; Sindoma Realty Sdn Bhd v. Oversea-Chinese Banking Corpn Ltd & Ors [1988] 1 LNS 222 HC ***(refd)***

Pengiran Othman Shah Pengiran Mohd Yussof & Anor v. Karambunai Resorts Sdn Bhd & 3 Ors [1996] 1 CLJ 257 CA ***(refd)***

Perspective Management Services Sdn Bhd v. Seganom Sdn Bhd [2004] 4 CLJ 466 CA ***(refd)***

Sim Kie Chon v. Superintendent of Pudu Prison & Ors [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 SC ***(refd)***

Sirros v. Moore & Ors [1975] QB 118 ***(refd)***

Superintendent of Pudu Prison & Ors v. Sim Kie Chon [1986] 1 CLJ 548; [1986] CLJ (Rep) 256 SC ***(refd)***

Tai Choi Yu v. Ian Chin Hon Chong [2002] 2 CLJ 259 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 14

Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (d)

Public Authorities Protection Act 1948, s. 2(b)

For the plaintiff - In person

For the defendants - AG's Chambers

Reported by Amutha Suppayah

JUDGMENT

Nor Bee Ariffin J:

Enclosure 9

[1] By this summons in chambers ('SIC'), the defendants apply to strike out the writ of summons and the statement of claim dated 31 May 2012 under O. 18 r. 19(1)(a) or (b) or (d) of the Rules of the High Court 1980 ('RHC') with cost to be assessed pursuant to s. 2(b) of the Public Authorities Protection Act 1948. I had on 29 October 2012 allowed the application and I now give my reasons for arriving at that finding.

The Law On Striking Out

[2] The defendants had combined all paras. (a), (b) and (d) in this SIC. No application is made under para. (c). To eliminate any issue or misapprehension as to whether the application is regular or otherwise and how the application should be looked at, reference is made to the case of *Malayan United Finance Bhd lwn. Cheung Kong Plantation Sdn Bhd & Yang Lain* [2000] 2 CLJ 601; [2000] 2 MLJ 38 where Abdul Hamid Mohamad J (as he then was) addressed the application of the law with respect thereto. His Lordship said the following at p. 605 (CLJ); p. 42 (MLJ):

> Sebelum saya bincang selanjutnya, elok juga dirujuk kepada satu ayat dalam *Halsbury's Laws of Malaysia*, Jilid 1, perenggan 10.6-075 mengenai peruntukan A. 18 k. 19 KMT itu:
>
> > ... the applicant is entitled to rely on all or any of the grounds specified in the appropriate rule of court.
>
> Maksudnya, semestinyalah dalam satu permohonan. Jika tidak sesuatu pihak boleh membuat permohonan sebanyak empat kali dan setiap kali merayu sehingga ke Mahkamah Persekutuan (atau sekurang-kurang Mahkamah Rayuan). Bayangkan berapa lama masa yang akan diambil dan berapa banyak kos yang akan terlibat.
>
> Mengenai keputusan Hakim Mahkamah Tinggi Johor Bahru dalam kes *Sambu (M) Sdn Bhd* [1997] 1 CLJ 775 seperti yang saya ringkaskan dalam perenggan (a) di atas, saya bersetuju dengan keputusannya. Peruntukan perenggan (2) kaedah itu sudah cukup jelas. Tidaklah perlu saya merujuk kepada mana-mana penghakiman.
>
> Mengenai (b), saya juga bersetuju bahawa perenggan-perenggan (a) hingga (d) itu adalah secara berasingan ('disjunctive'). Tetapi, apakah ertinya? Bagi saya, ertinya seseorang pemohon boleh menggunakan mana-mana satu perenggan-perenggan itu dalam permohonannya. Tetapi adakah itu bererti bahawa seorang pemohon tidak boleh menggunakan lebih dari satu perenggan itu dalam satu permohonan?

A Saya tidak fikir ada sesiapa pun boleh menghujahkan bahawa perenggan (b), (c) dan (d), tidak boleh digunakan bersama-sama. Maka, setakat yang berkenaan dengan (b), (c) dan (d), walaupun 'disjunctive', itu tidak bermakna kesemuanya tidak boleh dipakai bersama dalam satu permohonan.

B Maka soal seterusnya ialah sama ada perenggan (a) boleh dipakai bersama-sama perenggan (b), (c) dan (d). Saya tidak fikir bahawa penggunaan perkataan 'atau' di antara perenggan-perenggan itu boleh dijadikan alasan untuk mengatakan bahawa perenggan (a) tidak boleh dipakai bersama-sama perenggan-perenggan lain. Sebab, jika itulah hujahnya maka (b), (c) dan (d) juga sepatutnya tidak boleh dipakai
C bersama, atas alasan yang sama.

Maka, satu-satunya alasan mengapa (a) tidak boleh dipakai bersama-sama perenggan-perenggan lain ialah kerana di bawah (a) keterangan afidavit tidak boleh dipakai, manakala di bawah perenggan-perenggan lain, boleh. Itu sahaja.

D

Dengan penuh hormat kepada semua, saya berpendapat alasan itu pun tidaklah cukup untuk mengatakan bahawa sesuatu permohonan yang memakai ke semua perenggan (a) hingga (d) itu tidak mengikut peraturan, apatah lagi tidak sah dan batal. Kaedah itu tidak mengatakan demikian. Apa yang disebut ialah apabila mendengar
E permohonan di bawah (a) mahkamah tidak boleh mengambil kira keterangan afidavit, tetapi apabila mendengar permohonan di bawah perenggan-perenggan lain itu, boleh. Maka apa yang perlu dilakukan oleh mahkamah ialah semasa mendengar dan memutuskan sesuatu permohonan di bawah (a) jangan ambil kira keterangan dalam afidavit: putuskan berdasarkan pliding sahaja. Tetapi, semasa mendengar dan
F menimbang permohonan itu di bawah perenggan-perenggan lain itu, bacalah dan timbanglah keterangan-keterangan afidavit itu.

The extract above provide the answer to the issue at hand.

[3] The law relating to the application of O. 18 r. 19 of the RHC is
G trite as expounded by the courts in *Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors & Other Cases* [1983] 2 CLJ 68; [1983] CLJ (Rep) 165; [1983] 2 MLJ 227, *Sim Kie Chon v. Superintendent of Pudu Prison & Ors* [1985] 2 CLJ 449; [1985] CLJ (Rep) 293; [1985] 2 MLJ 386, *Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking*
H *Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36 and *Pengiran Othman Shah Pengiran Mohd Yussof & Anor v. Karambunai Resorts Sdn Bhd & 3 Ors* [1996] 1 CLJ 257; [1996] 1 MLJ 309, to cite a few. I shall now proceed to deal with the grounds the basis of which this application was founded.

I

Order 18 r. 19(a) Of The RHC

[4] It is trite that in an application made pursuant to O. 18 r. 19(a) of the RHC, no evidence shall be admissible and the court shall consider only the pleadings of the parties. The Federal Court in *New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 LNS 1; [1985] 1 MLJ 226. At p. 227, Mohamed Azmi FCJ in delivering the decision of the court said:

> It is therefore clear law that in an application to strike out pleadings under order 18 rule 19(1)(a), no evidence shall be admissible, and the court must consider only the pleadings for the purpose of determining whether the statement of claim disclosed no reasonable cause of action or the statement of defence disclosed no defence. The test to be applied is whether on the face of the pleading, the court is prepared to say that the cause of action or the defence is obviously unsustainable (see *AG of the Duchy of Lancester v. L and NW Ry Co*).

See also *Berjaya Development Sdn Bhd v. Keretapi Tanah Melayu Bhd & Anor* [2007] 6 CLJ 687; [2007] 7 MLJ 489 and *Honan Plantations Sdn Bhd v. Kerajaan Negeri Johor & Ors* [1996] 4 CLJ 373.

[5] The Singapore Court of Appeal in *Gabriel Peter & Partners (suing as a firm) v. Wee Chong Jin* [1998] 1 SLR 374 discussed the principles in determining what is a "reasonable cause of action" under O. 18 r. 19(a) of the RHC at p. 384:

> The guiding principle in determining what a 'reasonable cause of action' is under O. 18 r. 19(1)(a) was succinctly pronounced by Lord Pearson in *Drummond-Jackson v. British Medical Association* [1970] 1 All ER 1094. A reasonable cause of action, according to His Lordship, connotes a cause of action which has some chance of success when only the allegations in the pleading are considered. As long as the statement of claim discloses some cause of action, or raises some question fit to be decided at the trial, the mere fact that the case is weak and is not likely to succeed is no ground for striking it out. Where a statement of claim is defective only in not containing particulars to which the defendant is entitled, the application should be made for particulars under O. 18 r. 12 and not for an order to strike out the statement.

The defendants bear the burden of establishing that the plaintiff have no reasonable cause of action against them (see *Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor* [2008] 1 CLJ 651).

[6] I have carefully examined the plaintiff's statement of claims. Pleaded therein that she was a former employee of Syarikat Total Teamwork Sdn Bhd ('TTSB'), serving as an accounts manager from

16 June 1997 until 30 August 1998. During her tenure, she discovered a number of discrepancies and irregularities in TTSB's financial accounts and that TTSB and its employee/director committed criminal breach of trust, fraud, forgery, cheating in its dealing with various financial institutions such as UOB, Hong Leong Finance Berhad and Malayan Banking Berhad. Wrongful activities were also said to have been committed against TTSB by TTSBs' own employee/director. This can be seen from paras. 8 until 21. Paragraphs 22, 23, 24 are still on allegations against TTSB and its directors and the legal tussles the plaintiff had with them in Kuala Lumpur Magistrate Court Summons No 77-440-2002 and Kuala Lumpur High Court Civil Suit No. S3-23-75-2004 ('*KLHC* case').

[7] At paras. 25 and 26, the plaintiff pleaded that Puan Raja Noor Adilla binti Raja Mahyaldin, a Senior Assistant Registrar ('SAR') in the *KLHC* case had on 1 September 2005 struck out the plaintiff's statement of defence and counterclaim. On appeal to the judge in chambers, the appeal was dismissed on 21 March 2006. On 16 September 2005 TTSB filed a notice of appointment to assess damages. The subsequent paras. 27 until 41 are matters pertaining to proceedings on the assessment of damages. On 22 June 2009, the fourth defendant (D4) awarded TTSB aggravated damages in the sum of RM200,000, RM734,092.56 as damages for loss of profit and costs of provision of bank guarantees, interest at 8% per annum from the date the damages are assessed until full realisation and costs to be taxed. The plaintiff filed an appeal on the very next day against the decision of D4. D4's decision was said to be "defektif, tidak berasas dan tidak masuk akal" and D4 had come to that decision "kerana beliau adalah kurang cekap atau kurang berusaha dan telah gagal mencapai prestasi yang terbaik dalam pentadbiran keadilan untuk mencegah fraud, pemalsuan dan penipuan yang berbangkit dari Total Teamwork Sdn Bhd (306379-U) dan Total Teamwork Construction Sdn Bhd (660041-H)".

[8] Paragraph 42 shows that the appeal was heard by the fifth defendant (D5). It was dismissed on 19 October 2009 as can be seen in para. 45. For this, D5 has "menyalahgunakan kuasa di Mahkamah Tinggi Kuala Lumpur Sivil 9 ...". Subsequent paras. 46, 47, 48, 49, G50, 51 contain allegations on wrongdoings by TTSB and its directors pertaining to the *KLHC* case.

[9] This action against the defendants stemmed from the plaintiff's dissatisfaction on the assessment of damages made in the *KLHC* case by D4 and the dismissal of the appeal against the decision of D4 by D5 as pleaded in paras. 52 and 53. As it was not spelt out in clear terms, in all likelihood the plaintiff could have intended the first

defendant (D1), the second defendant (D2) and the third defendant (D3) to be vicariously liable. The plaintiff alleged that the conduct of the defendants have caused plaintiff defamation, malicious prosecution and emergence of tort for the benefit of TTSB. The defendants are also alleged to have failed to duly exercise the powers and functions conferred on them with care and honesty because they have injured and prejudiced the public interest through their decisions that have caused serious financial losses to the plaintiff, financial institutions and insurance industry.

[10] The plaintiff's claim against both D4 and D5 are in their capacities as an SAR and a Judicial Commissioner of the High Court respectively arising from the decisions they had made in the discharge of their respective judicial functions, within their jurisdiction. There is no doubt about that and that is not an issue. The plaintiff claimed amongst others that D4 and D5 were guilty of unethical practices of conspiracy, deceit, fraud, corrupt practices, malicious prosecution, had infringed her fundamental rights under the constitution and had committed serious errors in the conduct of the proceedings before them, and thus had made bad decisions that had grave repercussions on her and a certain section of the community. Premised on that claim, this action is clearly wrong and not maintainable in law as it is prohibited by s. 14 of the Courts of Judicature Act 1964 ('Act 91'). The law reads:

> (1) No Judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.
>
> (2) No officer of any court or other person bound to execute the lawful warrants or orders of any Judge or other person acting judicially shall be liable to be sued in any civil court for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same.

[11] Learned Senior Federal Counsel submitted, and rightly so, that at the heart of the principle is its rationale existence, namely that the principle emanates from the need to protect the public and not as frequently perceived, the judge as was the finding of the Court of Appeal in the celebrated case of *Sirros v. Moore & Ors* [1975] QB 118 cited in reliance thereof. At p. 132, Lord Denning lucidly said:

> Ever since the year 1613, if not before, it had been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him.

A The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action. The remedy of the party aggrieved is to appeal to a Court B of Appeal or to apply for *habeas corpus*, or a writ or error or *certiorari*, or take some such step to reverse his ruling. Of course, if the judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts. That apart, however, a judge is not liable to an action for damages. The reason is not because the judge has any privilege to C make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear. It was well stated by Lord Tenterden CJ in *Garnett v. Ferrand* (18276 B&C 611, 625:

> D This freedom from action and question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be.

E At p. 141, Buckley LJ said:

> If the act was, or purported to be, a judicial act and was within the judicial powers of the judge, he is immune from civil liability. Public policy requires that the judge's conduct shall not be impugned: *Anderson v. Gorrie* [1895] 1 QB 668, 670. It is perhaps arguable that a F judge, though acting within his powers, might be shown to have acted so perversely or so irrationally that what he did should not be treated as a judicial act at all. In such a case the remedy of his removal from office would be available. I doubt whether it would be in the public interest that his conduct should be open to debate in a private action.

G **[12]** Again on the underlying reason for the conferment of judicial immunity, I find an interesting observation made by Rohana Yusuf JC citing (as she then was) in *Law Hock Hua & Anor v. Timbalan Pendaftar Mahkamah Tinggi Kuala Lumpur & Anor* [2006] 4 CLJ 300 at p. 309:

> H It has been stated times and again in all decided cases that the basis for judicial immunity is rooted in the need to protect the public but not a need to protect judges. Amongst the most important tribute that judges owe to the public are objectivity, independence and impartiality. Thus any innovative legal argument invoked against these attributes must be carefully scrutinized. It must be so, in order to I ensure the public that a presiding judge is discharging his duty without having to worry, or that his decision would not be based on a dispassionate appreciation of the facts and law related to the dispute.

> Otherwise, he may be affected by thoughts as to which party would pose a threat of litigation. As stated by Lord Denning in *Sirros* case (at p. 785) that so long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in fact or in law but so long as he honestly believes his action to be within jurisdiction, he should not be liable.

[13] In *Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor* [2008] 1 CLJ 651, Low Hop Bing JCA delivering the decision of the Court of Appeal discussed at length the application of the doctrine of judicial immunity at common law and as provided by statutes at home and in a number of other jurisdictions. The learned judge held the view at p. 679 that the application of the doctrine pursuant to s. 14 of Act 91 must be considered in the light of the facts and circumstances prevailing in each particular case, especially conduct which comes within the ambit of the expression "acting judicially". The learned judge went on to examine a number of decided cases and came this finding at p. 680:

> In our judgment, judicial immunity conferred by s. 14(1) is wide enough to extend to the discharge of his duties under art. 121 and the written law. These duties include all acts and duties expected or assigned to be performed by the first defendant, both within and outside Malaysia. The instructions and orders made by the first defendant are entirely within his authority and within the limits of his jurisdiction legally conferred upon him by Art. 121 and the written law, regardless of the fact that he was on leave in Singapore and outside the country. The mode and the manner including the place from which he exercised that authority (phone call from Singapore while on leave) are irrelevant.
>
> The facts and circumstances available in the court below and now in the instant appeal undoubtedly attract the application of judicial immunity under s. 14(1). The plaintiffs' purported cause of action is really an exercise in futility under O. 18 r. 19(1)(a), there being no reasonable cause of action against the first defendant, and so no vicarious liability can be attributed to the second defendant.
>
> Hence, the defendants have successfully established that the plaintiffs' statement of claim is devoid of any reasonable cause of action.

[14] As s. 14 of Act 91 affords D4 and D5 a complete defence of judicial immunity against any civil suit, the plaintiff's action against them is statute-barred. But the plaintiff is not left without any remedy. Section 14 of Act 91 in conferring D4 and D5 statutory protection from any civil liability only bars any civil suit to be maintained against them, but the door is not altogether shut for her to challenge their decisions

in the manner accorded by law. Whatever grievance and dissatisfaction the plaintiff may have against the decision of D4 and more particularly that of D5, she has available to her the avenue to appeal to the Court of Appeal. And she had actually exercised that right. The application of s. 14 of Act 91 therefore rendered the plaintiff's present action against the defendant clearly and obviously unsustainable and as aptly described by Sulaiman Daud JC (as he then was) in *Tai Choi Yu v. Ian Chin Hon Chong* [2002] 2 CLJ 259; [2002] 5 MLJ 518 is doomed to fail right from the onset. I thus hold that the defendants have successfully established that plaintiff's statement of claim is obviously unsustainable as it is bad in law. As there is no cause of action against D4 and D5, there cannot likewise be any as against D1, D2 and D3.

Order 18 r. 19(b) Of The RHC

[15] In *Boey Oi Leng v. Trans Resources Corporation Sdn Bhd* [2002] 1 CLJ 405, a decision by Low Hop Bing J (as he then was), it was said at p. 410 that:

> The word "scandalous" here means wholly unnecessary and irrelevant (see *Malaysian High Court Practice*, MLJ 1998 edn. p. 510)
>
> A petition may be described as "frivolous" or "vexatious" where it is obviously unsustainable eg, where the petition is *res judicata*, or where the wrong party is being sued, or without merit and unjustified: see *Malaysian High Court Practice*, *supra*.

The decision in this case was adopted by the Court of Appeal in *Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor.*

[16] D4 affirmed an affidavit in support of the application (encl. 10). She had the authority to affirm the affidavit on behalf of the other defendants. The same goes for the affidavits affirmed by D5. Therefore the averment by the plaintiff that D1, D2, D3 and D5 has not come forward with their respective affidavit is misconceived.

[17] The orders made by D4 dated 22 June 2009 and by D5 dated 19 October 2009 are marked as exhs. PHN-1 and PHN-2 respectively in encl. 10. In the proceeding before D4, Dong Sech Sing gave evidence for TTSB. The plaintiff had filed submission for the hearing of the appeal and though the proceeding went on in her absence, that was entirely the discretion of D5 in deciding as such. The plaintiff's appeal against the decision of D5 was struck out by the Court of Appeal not on 30 June 2009 but on 10 January 2012. I must admit there were inaccurate references made to exh. PHN-3 in encl 10. Exhibit PHN-3 relates not to the appeal by the plaintiff against the decision of D5 but

against the decision of the judge in chambers on 21 March 2006 (exh. ZMY-3 in encl. 15) in reaffirming the decision of the SAR dated 1 September 2005. I may also need to state that the plaintiff had on the same day this present action was filed, also filed Kuala Lumpur High Court Case No. 22 NCvC-674-05-2012 against Total Teamwork Construction Sdn Bhd and four others based on the same and/or similar allegations raised in the present action. Exhibit DCC-2 in encl. 8 in Civil Suit No. 22 NCvC-674-05-2012 sets out the cause papers and the orders and the sequence of events that had taken place in the *KLHC* case. It must be impressed that I do not for a moment think that the inaccurate references made thereof in the affidavits and in the submission of the learned Senior Federal Counsel or even the references made to exh. DSS-2 in encl. 8 in Civil Suit No. 22 NCvC-674-05-2012 would cause any prejudice to the plaintiff in any manner whatsoever. It was intended merely to present a true and correct account of the proceedings in the *KLHC* case.

[18] The defendant contended that the matter now is *res judicata* as the decision of the Court of Appeal dated 10 January 2012 was not overruled by any other order of any court, and therefore must be seen as a final judgment. The principle of *res judicata* is trite, as lucidly illustrated by the Federal Court in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189. It was held at p. 791 (CLJ); p. 197 (MLJ):

> What is *res judicata*? It simply means that a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept is as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation - *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action - *nemo debet bis vexari pro eadem causa*.

The application of the doctrine of *res judicata* enunciated in *Asia Commercial Finance* was discussed at length by the Court of Appeal in the case of *Chong Kew v. Leow Lay & Ors* [2009] 1 CLJ 756; [2008] 6 MLJ 781. Low Hop Bing JCA in delivering the decision of the court said at p. 765 (CLJ); p. 789 (MLJ):

> (17) *Res judicata* for this purpose is therefore not confined to the issues which the court is actually asked to decide, but covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process

A of the court to allow a new proceeding to be started in respect of them: per Somervell LJ in *Greenhalgh v. Mallard* [1947] 2 All ER 255 at p. 257; and quoted with approval in the Privy Council in *Yat Tung Investment Co v. Dae Heng Bank & Anor* [1975] AC 581; [1975] 2 WLR 690 (see also *SCF Finance Co Ltd v. Masri & Anor (No 3)* [1987] QB 1028; [1987] 1 All ER 194 (CA); *Bell v. Holmes* [1956] 3 All ER 449; B [1956] 1 WLR 1359; and *Hoystead v. Taxation Commissioner* [1962] AC 155.

[19] In *Hamzah Mat Sah & Anor v. Bank Pembangunan Malaysia Berhad* [2012] 1 LNS 384, Rayuan Sivil No. W-02-(IM)-859-2011, the C respondent had entered summary judgment against Hemat Shipping Sdn Bhd as borrower and the appellants as guarantors in Civil Suit No. D1-1448-2003. Both appellants appealed to the judge in chambers but the appeal was dismissed. The appellants did not obtained any stay and neither did they appeal to the Court of Appeal. The respondent subsequently took out a bankruptcy proceedings against the appellants. D The appellants then commenced the instant action in Kuala Lumpur High Court *vide* Civil Suit No. S-22-899-2010 claiming for a declaration that the summary judgment obtained was improper and ought to be set aside and they be given unconditional leave to defend the action. The respondent filed an application to strike out the appellant's writ and E statement of claim. The learned judge allowed the application and the appellants appealed to the Court of Appeal. The court dismissed the appeal and observed the following:

> The issues in this action had been dealt with and disposed of in Civil Suit No. D1-22-1448-2003. The judgment obtained by the respondent F in Civil Suit No. D1-22-1448-2003 was one that was obtained by way of summary judgment after consideration on the merits. It is important to emphasise that the appellants did not appeal to the Court of Appeal after their appeal to the Judge in Chambers was dismissed in 2005. Indeed, a final judgment had been pronounced by a court of competent jurisdiction over the parties and hence, the appellants are G not permitted to litigate once more and are thus estopped in bringing this action on the basis of both *res judicata* and issue estoppel.

[20] Abdul Malik Ishak JCA in delivering the decision of the Court of Appeal in *Everise Hectares Sdn Bhd v. Citibank Bhd* [2011] 2 CLJ 25, in H ruling that the doctrine of *res judicata* ought to apply in favour of the respondent, quoted and reproduced an extract of the case of *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104 at pp. 33 and 34:

> [15] Gopal Sri Ram JCA (later FCJ) writing for this court in *Hartecon* I *JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104, CA, had this to say about the principle of *res judicata* at pp. 113 to 114 of the report:

If authority is needed for the proposition which has commended itself to us, it is to be found in *Government of Malaysia v. Dato Chong Kok Lim* [1973] 1 LNS 35; [1973] 2 MLJ 74 which was drawn to the attention of counsel during argument and in which there appears the following passage in the judgment of Sharma J (at p. 76):

In *Satyadhyan Ghosel & Ors v. Sint Deorajin Dobi and Another* AIR [1960] SC 941, the statement of the law on the subject is given thus:

> The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res* is *judicata*, it shall be not adjudged again. Primarily it applies as between past litigation and future litigation. When a matter - whether on a question of fact or a question of law - has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of *res judicata* is embodied in relation to suits in s. 11 of the Code of Civil Procedure; but even where s. 11 does not apply, the principle of *res judicata* has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.
>
> The principle of *res judicata* applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.

A decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit. (See *Peareth v. Marriott* [1883] 22 Ch D 182, *Hook v. Administrator-General of Bengal & Ors* LR 48 IA 187 and *Re Trusts of the Will of Tan Tye (Deceased) Yap Liang Neo v. Tan Yew Ghee and Another* [1936] 1 LNS 23; [1936] MLJ 141 at pp. 147-151). Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication. (See *Louis Dreyfus v. Aruna Chalayya* LR 58 IA 381).

[21] It is my considered view that the plaintiff's claim is equally scandalous, frivolous and vexatious. Her claim is *res judicata*. The order by the learned judge in chambers on 21 March 2006 (exh. ZMY-3 in encl. 15) was not set aside. Thus the decision pronounced in favour of TTSB in the *KLHC* case has become final and the plaintiff must not be allowed in the present action to canvass the matter again. As it concern the assessment of damages and the decision of D5, the appeal against the learned judge's decision in dismissing the plaintiff's appeal against the decision of D4, has also been adjudged and a final decision pronounced by the Court of Appeal on 10 January 2012. The plaintiff is thus estopped in bringing this action on the basis of both *res judicata* and issue estoppels. It is without any doubt that by this present action, the plaintiff attempted to relitigate and reopen her earlier case in *KLHC* case and the appeals against the decisions of D4 and D5, and she cannot be permitted to do so.

[22] It is also trite law that the doctrine of *res judicata* in the broad sense requires the plaintiff to lay before the Court of Appeal all matters which should have been raised in the appeal over the decision of D5 which dismissed the appeal against the decision of D4 in the proceeding on the assessment of damages in the *KLHC* case, and that would necessarily include the so called misconduct of D4 and D5 and all allegations pertaining thereto. In *Oversea-Chinese Banking Corpn Ltd v. Sindoma Realty Sdn Bhd and Other Applications; Sindoma Realty Sdn Bhd v. Oversea-Chinese Banking Corpn Ltd & Ors* [1988] 1 LNS 222, Abu Mansor J held at p. 381:

> Even if this court could give the order to restrain, the court concludes that this matter is *res judicata* in the broad sense as the matters raised could have been raised in the foreclosure proceedings. I find the authority in *Yau Tung Investment Co Ltd v. Dao Heng Bank Ltd & Anor* binding on this court where it was held that matters which could have been raised earlier should have been raised in the earlier proceeding and to raise again here is an abuse of the process of the court.

In *Perspective Management Services Sdn Bhd v. Seganom Sdn Bhd* [2004] 4 CLJ 466 at p. 490, it was ruled:

> Even assuming that the learned counsel was right that there was no such claim in the first suit, the fault was with the respondent if it did not make such claim in the first suit. It is not disputed that the facts leading to those shares being in the hands of the appellant and the refusal to return those shares are the same in the first suit and in the present suit. If the respondent failed to claim for wrongful detention in the first suit, then the respondent was at fault. The facts in the present suit are exactly the same as in the first suit and we could not

> see any reason why the respondent did not claim for wrongful detention and why it is necessary for the respondent to file another suit to claim for wrongful detention. ....
>
> We are of the view that in filing the first suit and the present suit, the respondent was attempting to make two separate claims arising from the same cause of action and in respect of the same breach, and this is clearly an abuse of the process of the court.

The Federal Court in *Asia Commercial Finance (M) Bhd* at p. 793 (CLJ); p. 200 (MLJ) ruled that:

> It is further necessary at this stage to understand the import of the words in the said famous statement, ie '... every point which properly belonged to the subject of litigation ...' which Somervell LJ explained in *Greenhalgh v. Mallard* [1947] 2 All ER 255 at p 257 as follows:
>
> > ... *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

The binding effect of the decisions in all the above cases to the instant case would mean that the plaintiff must not be permitted to pursue her present action. Whatever be the plaintiff's reasons for bringing this action concerns matters which could have been raised and should have been raised before the Court of Appeal. To raise again here is clearly a case of an abuse of the process of the court.

[23] It is pertinent to note that the defendants had not pleaded *res judicata* in their defence. This to my mind does not preclude the defendant from raising or relying on the doctrine of *res judicata* as ruled by Abdoolcader SCJ in the case of *Superintendent of Pudu Prison & Ors v. Sim Kie Chon* [1986] 1 CLJ 548; [1986] CLJ (Rep) 256 at p. 261; [1986] 1 MLJ 494 at p. 498:

> There is moreover the inherent jurisdiction of the court in cases where *res judicata* is not strictly established, and where estoppels *per rem judicatam* has not been sufficiently pleaded, or made out, but nevertheless the circumstances are such as to render any reagitation of the questions formally adjudicated upon a scandal and an abuse, the court will not hesitate to dismiss the action, or stay proceedings therein, or strike out the defence thereto, as the case may require ...

[24] Similar stand was taken by the Supreme Court in *Asia Commercial Finance (M) Bhd*, adopting with approval the case of *Superintendent of Pudu Prison v. Sim Kie Chon* where it was held at p. 795 (CLJ); p. 202 (MLJ):

> Another source of small confusion is the rule that generally an estoppels, of which an estoppel *per rem judicatam* is a kind, as the name implies, has to be pleaded. But in *Superintendent of Pudu Prison v. Sim Kie Chong* [1986] 1 MLJ 494 at p 498, Abdoolcader SCJ held to the effect that the court has the inherent jurisdiction to dismiss an action by applying the doctrine of *res judicata* against a party even if it has not been pleaded. We venture to think the reason for the *ratio* is that an estoppel or exclusion of evidence based on a question of public policy, ie, in this case, the question of public policy that there should be finality in litigation, is more vigorous in excluding evidence and need not be pleaded, unlike an ordinary estoppels which should be pleaded.

[25] In concluding that the doctrine has its application to the instant case, I also wish to note the observation made on the same subject by Low Hop Bing JCA in *Chong Kew v. Leow Lay & Ors* at p. 766 (CLJ); p. 790 (MLJ):

> In considering the authorities cited for the association, I am of the view that the plaintiff's reliance on the judgment of Ajaib Singh (later SCJ) in *Florence Bailes* in the High Court is unsustainable, because the *ratio decidendi* there ie that where the plea if *res judicata* had not been pleaded by the defendant, it could not be raised as a preliminary objection to the hearing of the plaintiff's suit, is no longer good law as it has now been overruled, in view of the decision of the Supreme Court in *Sim Kie Chong* to the contrary.

Order 18 r. 19(d) Of The RHC

[26] The scope of an abuse of the process of the court was given an explanation by the Singapore Court of Appeal in *Gabriel Peter & Partners (supra)*. At p. 384 the court said:

> The term, 'abuse of the process of the Court', in O. 18 r. 19(1)(d), has been given a wide interpretations by the courts. It includes considerations of public policy and the interests of justice. The term signifies that the process of the court must be used *bona fide* and properly and must not be abused. The court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a mean of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious and an abuse of process are not closed and will depend on all the relevant circumstances of the case. A type of conduct which has been judicially acknowledged as an abuse of process is the bringing of an action for collateral purpose, as was raised by the respondents. In *Lonrho v.*

Frayed (No. 5) (1993) 1 WLR 1489, Stuart-Smith LJ stated that, if an action was not brought *bona fide* for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the court.

[27] In *Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor* at p. 682, Low Hop Bing JCA held that:

Illustrations of an abuse of the process of the court include:

(a) An intention to embarrass the defendants: *Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd* [1989] 1 LNS 26; or

(b) Where the process of the court has not been used in a *bona fide* manner and has been abused: *Hadi Hassan v. Suria Records Sdn Bhd & Ors* [2004] 8 CLJ 225.

The categories of abuse of process of the court are never closed and will certainly proliferate pursuant to the myriad of circumstance available from the factual matrix found in each particular case.

[28] The filing of this action demonstrates the plaintiff's intention to abuse and embarrass D4 and D5 and the other defendants. She has created through her pleadings the platform to launch attacks on their efficiency and competency in the discharge of their judicial duties despite the decision of the Court of Appeal. The plaintiff in her pleadings had made numerous allegations and incredulous imputations against both D4 and D5 with blatant and complete disregard to the absolute privilege of judicial immunity conferred by the law on them, the operation of which will render the plaintiff with absolutely no cause of action against both of them. Whether the plaintiff, who is unrepresented by choice, is able to appreciate the effect of the law on judicial immunity or the doctrine of *res judicata*, is wholly irrelevant. There could certainly be no ignorance on her part as to the application of the doctrine of *res judicata* since she had addressed the same in her affidavit and submission. The plaintiff has indeed abused the process of the court. The circumstances of the case and the interest of justice warrant that the plaintiff must be prevented from pursuing her claims. The writ and the statement of claim must therefore be struck out.